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90-1610

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

HWANG JUNG JOO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAN P. DANILOV, ESQUIRE
LAW OFFICES OF DAN P. DANILOV
Suite 2303 – One Union Square
Seattle, Washington 98101-3143
(206) 624-6868

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit misconstrue this Court's holding in *INS v. Bagamasbad*, 429 U.S. 24 (1976) and deny petitioner his right to judicial review of all final orders of deportation pursuant to 8 U.S.C. § 1105a(a), when, because his separate application for adjustment of status pursuant to 8 U.S.C. § 1255(a) was rejected on discretionary grounds, it failed to review:

> (1) the Board of Immigration Appeals' rejection of his application for a waiver of excludability pursuant to 8 U.S.C. § 1182(i)(1); and
>
> (2) the underlying issue of whether his conduct had in fact rendered him excludable pursuant to 8 U.S.C. § 1182(a)(6)(C)(i), even though the Board made an express finding that his conduct had?

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I. OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ninth Circuit in *Hwang Jung Joo v. Immigration and Naturalization Service,* is reprinted in the Appendix at pages 1-4. The unreported decision of the Board of Immigration Appeals in *In re Joo* is reprinted in the Appendix at pages 5-22.

II. JURISDICTION IN THE SUPREME COURT

The date of entry of the judgment sought to be reviewed is January 18, 1991.

Jurisdiction is conferred on the Supreme Court of the United States to review this case by writ of certiorari by 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

A. 8 U.S.C. § 1105a(a).

B. 8 U.S.C. § 1182(a)(6)(C)(i) (as amended, reorganized and redesignated by § 601 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. Law 101-649, 104 Stat. 4978; formerly 8 U.S.C. § 1182(a)(19)).

C. 8 U.S.C. § 1182(i)(1) (as amended by Sec. 601 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. Law 101-649, 104 Stat. 4978).

IV. STATEMENT OF THE CASE

The petitioner, Hwang Jung Joo, is a citizen of the Republic of Korea. C.A.R. 137.[1] He obtained a nonimmigrant B-1 visa in 1984 from another Korean by paying $5,000. C.A.R. 140. After obtaining the visa, he quit his job and terminated the lease for his apartment in Korea. C.A.R. 115-116. He arrived in the U.S. in August, 1984. C.A.R. 137. In November, 1984 he met a woman named Hyon Suk Cho, and they married two months later. C.A.R. 114. Mr. Joo's wife filed an immigrant visa petition on his behalf. C.A.R. 185-190. After the application was approved and the priority date for his visa became current, Mr. Joo filed an application to adjust his status from a nonimmigrant to that of a permanent resident pursuant to 8 U.S.C. § 1255(a). C.A.R. 137-139. On June 16, 1986, he was interviewed by an Immigration and Naturalization Service (INS) examiner about his adjustment application. When Mr. Joo was questioned under oath about the visa and why the U.S. Embassy in Korea did not have a record of it, he at first claimed that the visa and passport were valid, but he immediately retracted this statement and prepared a written statement admitting that he had paid an individual a total of $5,000 for his visa and passport. C.A.R. 140. Mr. Joo provided the INS with information that resulted two months later in the arrest of the individuals responsible for obtaining the passport and visa. C.A.R. 141-142.

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[1] "C.A.R." refers to the Certified Administrative Record containing copies of the documents in the Record of Proceeding in this case filed with the United States Court of Appeals for the Ninth Circuit by the Executive Office for Immigration Review.

As a result of Mr. Joo's statements, the INS issued an Order to Show Cause charging that Mr. Joo was deportable under 8 U.S.C. § 1251(a)(1) as an alien excludable at entry under 8 U.S.C. § 1182(a)(20) as an immigrant not in possession of a valid immigrant visa. C.A.R. 134-136. At the deportation hearing on October 28, 1986, Mr. Joo conceded that he was deportable as charged, C.A.R. 187, and resubmitted his request to adjust his status to that of a permanent resident. C.A.R. 137-139. Mr. Joo also applied for a waiver of excludability pursuant to 8 U.S.C. § 1182(i)(1), to remove any possibility of being found excludable under 8 U.S.C. § 1182(a)(6)(C)(i) for having procured a visa through fraud or misrepresentation, C.A.R. 208, and for voluntary departure pursuant to 8 U.S.C. § 1254(e). C.A.R. 87.

The immigration judge denied all the requested relief and ordered Mr. Joo deported. C.A.R. 81-82. Mr. Joo then appealed the decision to the Board of Immigration Appeals (BIA). C.A.R. 74.

The BIA dismissed the appeal, first denying Mr. Joo's requests for adjustment of status in the exercise of discretion. Appendix, page 17. In deciding whether to exercise its discretion favorably, the BIA went well beyond what was charged in the Order to Show Cause, and specifically found that Mr. Joo perpetrated "a fraud upon entering the United States. . . ." Appendix, page 16. The BIA then rejected in the exercise of discretion Mr. Joo's application for a waiver of excludability because it concluded that the positive equities in Mr. Joo's favor were outweighed by his fraudulent conduct. Appendix, page 21. In making this determination, the BIA specifically found that Mr.

Joo's "fraudulent conduct would constitute deportability pursuant to section 241(a)(1) [8 U.S.C. § 1251(a)(1)] as excludable at entry under section 212(a)(19) of the Act [presently 8 U.S.C. § 1182(a)(6)(C)(i)], whether charged or not." Appendix, page 20. Finally, the BIA denied Mr. Joo's request for voluntary departure in the exercise of discretion. Appendix, page 21.

Mr. Joo then filed a petition for review with the United States Court of Appeals for the Ninth Circuit.[2] The court of appeals denied the petition. Appendix, page 4. The court, relying on this Court's holding in *INS v. Bagamasbad*, 429 U.S. 24 (1976), concluded that it did not need to decide the issues in the case concerning Mr. Joo's request for a waiver of excludability. Appendix, page 4. The court asserted that "The BIA is not required to consider whether the threshold statutory eligibility requirements are met if it decides that the relief should be denied as a matter of discretion." Appendix, page 3. It then limited its review to the issues of whether the BIA abused its discretion in denying Mr. Joo's application for adjustment of status and voluntary departure, and concluded that the findings by the BIA justifying its discretionary denial of Mr. Joo's adjustment of status application were supported by the record, and that the BIA had properly weighed the favorable factors present in the case against the adverse factors. Appendix, pages 3-4.

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[2] The basis for jurisdiction in the United States Court of Appeals was 8 U.S.C. § 1105a(a).

V. REASONS FOR GRANTING PETITION

THIS CASE SHOULD BE ACCEPTED FOR REVIEW BECAUSE THE COURT OF APPEALS HAS EXPANDED THIS COURT'S HOLDING IN *INS V. BAGAMASBAD* TO AN UNACCEPTABLE EXTREME BY REFUSING TO REVIEW (1) THE DECISION ON A SEPARATE APPLICATION SUBMITTED IN CONNECTION WITH A DEPORTATION PROCEEDING, AND (2) AN UNDERLYING LEGAL ISSUE ON WHICH THE BIA MADE A SPECIFIC FINDING THAT WILL BAR THE PETITIONER FOR LIFE FROM JOINING HIS FAMILY IN THE U.S., SIMPLY BECAUSE ANOTHER APPLICATION HAD BEEN DENIED IN THE EXERCISE OF DISCRETION.

This Court should grant this petition for review. The Court of Appeals for the Ninth Circuit has seriously misconstrued the holding of this Court in *INS v. Bagamasbad*, 429 U.S. 24 (1976). It has adopted a broad and novel view of the holding of that case that seriously undermines an alien's statutory right to appellate review of all final orders of deportation. 8 U.S.C. § 1105a(a).

In *Bagamasbad*, the alien had been denied relief by the Board of Immigration Appeals in the exercise of discretion without a finding on the issue of whether he was statutorily eligible for the relief he requested. The Court held that a finding in regards to statutory eligibility was not necessary when the Board denied an application in the exercise of discretion. The Court stated that the American Consul abroad would know that the decision had been discretionary and had no bearing on the alien's statutory eligibility for the requested relief, and that an agency was not required to make purely advisory findings.

In this case, the court of appeals concluded that under *Bagamasbad* it did not need to review Mr. Joo's separate application for a waiver of excludability because the BIA decided to reject Mr. Joo's application for adjustment of status in the exercise of discretion. It also failed to review the BIA's finding that Mr. Joo had engaged in conduct that would render him excludable pursuant to 8 U.S.C. § 1182(a)(6)(C)(i), even though the discretionary denial of both Mr. Joo's application for adjustment of status and of his request for a waiver of excludability was based on the BIA's legal conclusion on this issue.

This case is readily distinguishable from *Bagamasbad* and the court of appeals' decision has unreasonably extended the holding of that case. Mr. Joo made an application for a § 1182(i)(1) waiver of excludability, entirely separate from his application for adjustment. Thus it cannot be said that the BIA decision was by any means a purely advisory opinion. In fact, the application for waiver of excludability had also been ruled on earlier by the immigration judge. C.A.R. 81.

The failure of the court of appeals to review the decision on Mr. Joo's request for waiver of excludability on the ground that the BIA did not need to determine his statutory eligibility for adjustment of status is not supportable under any possible reading of *Bagamasbad*. Statutory eligibility for adjustment of status is not a prerequisite for the grant of § 1182(i)(1) waiver of excludability. Moreover, even if the position of the court of appeals is correct, then the BIA made an essentially advisory finding that Mr. Joo's conduct violated § 1182(a)(6)(C)(i). This finding, however, will in all likelihood be accepted by the American Consul when Mr. Joo

applies for an immigrant visa when he becomes eligible. It turns logic on its head to argue that an advisory finding by the BIA that may result in Mr. Joo being permanently barred from living with his wife and adopted child in the United States is not reviewable because the BIA is not required to make advisory findings.

There exist substantial and novel legal issues in this case about whether Mr. Joo's conduct in fact rendered him excludable under 8 U.S.C. § 1182(a)(6)(C)(i). Review was necessary because the BIA based its discretionary denials on its finding that Mr. Joo had violated § 1182(a)(6)(C)(i), and the reliance by an agency on one improper factor when making a discretionary determination may render the entire determination defective. *Wang v. INS*, 413 F.2d 286, 287 (9th Cir. 1969). These issues stem from the fact that § 1182(a)(6)(C)(i) had been amended by Congress through Section 6 of the Immigration and Marriage Fraud Amendments of 1986, Act of Nov. 10, 1986, Pub. L. 99-639, 100 Stat. 3537, 3543, and the courts have not ruled on the meaning of the amendments, or to what extent the amendments are retroactive.

In conclusion, then, the decision of the court of appeals in this case represents a reading of this Court's holding in *Bagamasbad* that is strained beyond all meaning. The error of the court of appeals, is not only glaring, but it also has a dramatic impact on Mr. Joo, and if allowed to stand, could cause him to be unjustly barred from the United States for life.

VI. CONCLUSION

For the foregoing reasons, this Court should grant this petition, and issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. It is also requested that the decision of the court of appeals be summarily reversed, and that the court of appeals be directed to consider all the issues presented to it for review.

Respectfully submitted,

DAN P. DANILOV, ESQUIRE
Law Offices of Dan P. Danilov
Suite 2303 – One Union Square
Seattle, Washington 98101-3143
(206) 624-6868

Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HWANG JUNG JOO, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	No. 90-70193 I&NS No. A26-751-271 MEMORANDUM* (Filed JAN 18 1991)

Petition to Review a Decision of the
Immigration and Naturalization Service

Submitted January 7, 1991**
Seattle, Washington

Before: WRIGHT, BRUNETTI, and LEAVY, Circuit Judges.

Hwang Jung Joo, a native and citizen of the Republic of Korea, petitions for review of a decision of the Board of Immigration Appeals ("BIA"). The BIA dismissed Joo's appeal and upheld the immigration judge's ("IJ") denial of Joo's requests for discretionary relief from deportation under the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1182(i) and 1255, which would have allowed Joo to obtain permanent residence status in the United States.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

The BIA also upheld the IJ's denial of Joo's request for voluntary departure pursuant to 8 U.S.C. § 1254(e). We deny the petition.

DISCUSSION

I. Adjustment of Status

Joo contends the BIA abused its discretion by dismissing his appeal and upholding the IJ's denial of his application for adjustment of status to that of a lawful permanent resident pursuant to section 245 of the Act, 8 U.S.C. § 1255. Joo sets forth a series of arguments in support of this contention. First, Joo asserts that the fraud committed upon his entry into the United States does not render him excludable, or ineligible to receive a visa, under either repealed or amended section 212(a)(19) of the Act, 8 U.S.C. § 1182(a)(19). Second, Joo claims that the fraud committed at the service interview also does not render him excludable, or ineligible to receive a visa, under amended section 212(a)(19) because it was repudiated. Third, Joo alleges that there is no evidence in the record to support a finding that he committed fraud at his deportation hearing and thus be considered excludable, or ineligible to receive a visa, under amended section 212(a)(19). Finally, Joo maintains that even if he is excludable pursuant to section 212(a)(19), he should be granted a waiver of excludability pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). Joo concludes by arguing that, in light of several favorable equities, he is deserving of a grant of adjustment of status to that of a lawful permanent resident as a matter of discretion.

We need not decide all of these issues. The BIA is not required to consider whether the threshold statutory eligibility requirements are met if it decides that the relief should be denied as a matter of discretion. *INS v. Bagamasbad*, 429 U.S. 24 (1976). This is precisely what was done in this case. The BIA upheld the IJ's denial of Joo's application for an adjustment of status as a matter of discretion.[1] A determination of Joo's statutory eligibility for section 245 relief thus was never made. The BIA acted entirely within its authority in so proceeding. *Id.*

We review the BIA's decision denying Joo's application for adjustment of status on discretionary grounds for an abuse of discretion. *Patel v. Landon*, 739 F.2d 1455, 1457 (9th Cir. 1984).

We conclude that the BIA's decision was not an abuse of discretion. Each of the findings set forth by the BIA in justifying its discretionary denial is supported by the record. It is uncontested that Joo paid $5000 to an individual in Korea in order to obtain a fraudulent visa, with which he later entered the United States. It is also uncontested that Joo lied under oath at the INS interview in order to facilitate an earlier application for adjustment of status.[2] Finally, the BIA's determination that Joo had a

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[1] Both the IJ and the District Director also denied Joo's application on discretionary grounds.

[2] Joo contends that his conduct at the INS interview should not be considered on the grounds that, although he lied under oath, he immediately retracted his fraudulent testimony. We disagree. If Joo had been charged with perjury, his subsequent retraction would have been relevant. However, Joo was not charged with perjury in this case, and the BIA was free to consider this factor in making its determination.

preconceived intent to remain in the United States upon entry is reasonable in light of the record. Joo testified that prior to leaving for the United States, he broke his long-term lease on his house, sold all his personal belongings, and quit his job. It was not unreasonable for the BIA to conclude that these facts clearly belied Joo's intent to remain permanently in the United States. Moreover, the BIA properly considered the countervailing equities weighing in Joo's favor, but determined that the adverse factors clearly were overriding. The BIA did not abuse its discretion.

II. Voluntary Departure

In the alternative, Joo contends the BIA erred by upholding the IJ's denial of his request for voluntary departure pursuant to section 244(e) of the Act, 8 U.S.C. § 1254(e). An alien who can establish, among other things, good moral character for the five years preceding an application for voluntary departure may be permitted to depart voluntarily. 8 U.S.C. § 1254(e) (Supp. 1990). However, it is within the BIA's discretion whether to grant or deny voluntary departure. *Cunanan v. INS*, 856 F.2d 1373, 1374 (9th Cir. 1988). We review a refusal to grant voluntary departure under the arbitrary and capricious standard. *Hernandez-Luis v. INS*, 869 F.2d 496, 499 (9th Cir. 1989).

The BIA denied Joo's request for voluntary departure on the same grounds for which it denied his application for adjustment of status. As noted above, this determination was supported by the record. Accordingly, we conclude that the BIA's denial of Joo's request for voluntary departure was not arbitrary or capricious.

PETITION DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A26 751 271 – Seattle Date: MAR 30 1990

In re: HWANG JUNG *JOO*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John C. O'Connor, Esquire
216 First Avenue S., Suite 333
Seattle, Washington 98104

ON BEHALF OF SERVICE: Carl D. Phillips
General Attorney

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20) of the Act

The respondent appeals from the October 28, 1986, decision of the immigration judge finding him deportable pursuant to section 241(a)(1), 8 U.S.C. § 1251(a)(1), as excludable at the time of entry pursuant to section 212(a)(20) of the Act, and denying his application for a waiver of exclusionary provisions pursuant to section 212(i) of the Act, and for adjustment of status pursuant to section 245(a) of the Act. The request for oral argument before the Board is denied. The appeal will be dismissed.

The respondent is a 41-year-old married male alien, native and citizen of Korea, who last entered the United

States on August 16, 1984. On June 17, 1986, the respondent was served with an Order to show Cause alleging his deportability pursuant to section 241(a)(1) of the Act in that at the time the respondent entered the Untied States he was not in possession of a valid unexpired immigrant visa but rather was in possession of a passport and non-immigrant visa obtained through fraud. On August 12, 1986, the respondent appeared at his deportation hearing with counsel and conceded his deportability. We thus find the respondent's deportability to have been established by clear, unequivocal, and convincing evidence. *Woodby v. INS*, 385 U.S. 276 (1966). On October 28, 1986, the respondent reappeared at his deportation hearing with counsel and presented oral and documentary evidence in his application for relief pursuant to sections 212(i) and 245(a) of the Act.

The respondent testified that although he paid $5,000.00 for a fraudulent passport and visa to enter the United States, after his arrest in this country he had assisted the Korean police in breaking up a fraudulent passport ring, from which he had obtained his passport and visa, by naming persons he knew were involved in the ring (Tr. at 7, 12). The respondent further testified that he was in the final process of adopting his five-year-old stepdaughter, the natural child born in Korea to his wife. He went on the testify that if he is deported to Korea, this would work a severe hardship on his wife who has a heart ailment and cannot drive and who depends on him for transportation to and from work. The respondent also stated that his deportation would traumatize his daughter who views him as her natural father.

Further direct testimony revealed that the respondent did not know his wife or her family prior to his entry in the United States; that he did not know she had divorced her husband only two weeks prior to the respondent's arrival in the United States in August 1984; that he met his wife in late November of that year and married her January 1985; that he quit his job as a clerk for a newspaper company prior to leaving Korea for the United States because of his imminent departure; that his wife paid part of the $5,000.00 he had paid for his passport; that he terminated his long-term lease on his apartment in anticipation of traveling to the United States; that he never formed the intent of remaining permanently in this country prior to leaving Korea; that he is not the child's natural father, and that he did not want to know who the natural father was (Tr. at 20-27, 30-35).

The respondent's wife testified that she has regularly been seeing a physician concerning a heart ailment, and also a psychiatrist about her nervous condition; that she depends on the respondent's participation "just like any other marriage"; that she is afraid of losing her husband and does not know what would happen to her and her daughter if her husband was deported; that she could take public transportation to and from work although she would not feel comfortable taking the bus home at one o'clock in the morning when she normally gets off work; that the respondent is not her child's natural father and that she did not know the respondent while living in Korea (Tr. at 38, 40-43).

Also of record is the respondent's Application for Status as Permanent Resident, Form I-485, dated June 16, 1986; a translated Korean newspaper article mentioning

the arrest of persons involved in operating a passport forgery ring; an October 16, 1986, letter from the wife's physician detailing her heart condition and stating that the condition is exacerbated whenever she is under anxiety, and that she is in great need of emotional support from her husband; an October 21, 1986, letter from the wife's psychiatrist detailing her psychiatric condition, and who states that she is in great need of support from her husband, and that if the respondent is deported she will have to resort to obtaining public assistance; a letter from the respondent's employer certifying his full-time job; federal tax returns of the respondent's wife for the 1983-85; a petition for a Decree of Adoption filed in the Superior Court for King County, State of Washington, wherein the respondent is petitioning to adopt his stepdaughter; respondent's Form I-134; a letter from the respondent's wife's employer attesting to her full-time employment; a statement from their bank concerning joint saving and checking accounts; Form I-171 of the wife's approved visa petition for the respondent, dated March 15, 1985. Also of record is Form I-130 dated February 25, 1985; a certificate of marriage between the parties; the wife's dissolution of marriage to her former husband, dated August 30, 1984; a message from the U.S. Embassy in Seoul confirming the respondent's fraudulent obtaining of a visa; the respondent's Form G-325; a copy of the respondent's fraudulently obtained passport; the respondent's Form I-601; a decision of the district director dated July 29, 1986, denying the respondent's application for adjustment of status based on his fraudulent documentation.

In his decision dated October 28, 1986, denying the respondent's applications for a waiver of exclusionary provisions under section 212(i) of the Act, and for adjustment of status pursuant to section 245 of the Act, the immigration judge based his denial on the respondent's misrepresentations and fraudulent conduct in gaining entry into the United States by purchasing a fraudulent passport for $5,000.00 while in Korea. The immigration judge found this conduct egregious to the point where it overrode the hardship to the respondent's wife, which the immigration judge noted involved a heart ailment that existed prior to the respondent allegedly meeting and then marrying his wife, a Korean national and lawful permanent resident of the United States. The immigration judge also denied the respondent's application for voluntary departure based on the respondent's conduct.

In his first issue on appeal, the respondent alleges that the immigration judge erred in failing to grant his application for a waiver of excludability pursuant to section 212(i) of the Act. The respondent argues, citing two cases decided by the Commissioner, *Matter of Alonzo*, 17 I&N Dec. 292 (R.C. 1979), and *Matter of Da Silva*, 17 I&N Dec. 288 (R.C. 1979), that the immigration judge erred in basing his decision on the fraud he committed in entering the United States – an action for which he sought forgiveness by applying for the waiver, and that the immigration judge further erred in giving little consideration to the favorable factors of record, including his wife's physical and psychological problems which were aggravated by her concern over his possible deportation, the respondent's petition to adopt his stepdaughter, the wife's inability to hold gainful employment if he is deported

because she is totally dependent upon him for transportation and would be forced to accept public assistance if he is deported, the respondent's "confusion" at the end of his adjustment of status interview repudiating his earlier statement that he did not enter the United States through fraudulent means, and his providing information to Korean authorities about the fraudulent passport ring there.

The respondent next argues that he is deserving of adjustment of status pursuant to section 245(a) of the Act based on the same positive equities noted above, or at least that the should be granted voluntary departure so that he can renew his application from Korea. The respondent argues that his use of fraudulent documents obtained through a third party in Korea, and his entering with a preconceived intent to remain in the United States, although adverse, are outweighed by the "unusual" equities of record. Finally, the respondent points out that his wife is now eligible for naturalization.[1] This factor, too, argues the respondent, is a "special and weighty equity" which should be accorded great deference.

In its opposition brief on appeal, the Service argues that the respondent failed to establish his entitlement for a waiver of excludability pursuant to section 212(i) of the Act. The Service argues that the Commissioner's holding in *Matter of Alonzo, supra,* is deficient in respect to the

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[1] On August 15, 1988, the Board received notice from counsel that the respondent's wife was in fact naturalized a United States citizen on May 26, 1988, and that her daughter's petition for naturalization was filed on June 3, 1988.

fraud underlying the respondent's charge of deportability. Rather, argues the Service, it should be appropriate, in seeking to determine whether an alien is deserving of the special benefit Congress has provided, to consider the egregious and devious conduct of the respondent leading up to his fraudulent entry into the United States, rather that to view such conduct as no different than an innocent misrepresentation, and to consider such fraud, as committed by the respondent, against the backdrop of an alien who committed fraud in order to flee from persecution in his native county where such fraud may properly be considered before granting asylum. In fact, argues the Service, the legislative background regarding section 241(f) and 212(i) of the Act indicates that it is appropriate to view the underlying conduct when making a discretionary decision. Thus, the Service argues that there is no intent by Congress to lessen the burden of proof regarding eligibility for admissibility, citing sections 291 and 235 of the Act, 8 U.S.C. §§ 1361 and 1225, in support of its contention. Consequently, the Service avers that the immigration judge and the Board may properly weigh and consider *all* matters of record before arriving at a discretionary determination pursuant to section 212(i) of the Act, especially for an alien whose only purpose behind his fraudulent entry was to effectuate an illegal immigration to the United States. Based on this, the Service argues, the favorable factors of record must be qualified where the respondent's wife's medical condition predated by three years her association and subsequent marriage to the respondent; where the physician's statement does not state, as the respondent alleges, that her heart ailment was induced by her concern over the

immigration status of her husband, and where her psychiatrist's statement, appearing to show that the respondent's wife was his patient for a short period of time, was superficial and apparently made in anticipation of the respondent's deportation hearings; where there is not evidence of record that the respondent actually adopted the child; where the testimony did not support a conclusion that the respondent's wife entirely dependent upon the respondent. Moreover, argues the Service, the respondent's "confession" to the Service officer was made only after being confronted by the Service with contrary evidence supplied by the American Embassy in Seoul. Thus, argues the Service, the respondent's attempt to turn such an adverse factor into a positive equity overlooks the fact that such a false statement is extremely serious and compounds the initial fraud used to gain entry; that there is no evidence that the information supplied by the respondent played any role in the subsequent arrest, a mere two months later, of the Korean counterfeiting passport ring. Finally, the Service points out that all of the family members are Korean, and except for the daughter who is a young minor, lived most of their adult lives in Korea and have family in Korea; that the respondent and his wife had a short-term courtship; that the respondent had apparently misrepresented certain facts concerning his employment in Korea on his Form G-325, which is inconsistent with his testimony; that he formed the intent to remain permanently in the United States before leaving Korea. Based on the factors of record, the Service forcefully argues that the respondent is not deserving of relief pursuant to section 212(i) of the Act.

As to adjustment of status, the Service argues that the respondent's willful misrepresentations during his interview with the Service makes the respondent excludable from the United States and ineligible for section 245(a) relief. As to voluntary departure, the Service argues that the respondent's fraudulent entry and his subsequent willful misrepresentations at his adjustment of status interview reflects that he is not a person of good moral character, pursuant to section 101(f)(6) of the Act, and is thus ineligible for section 244(e) relief as he provided false testimony for the purpose of obtaining a benefit under the Act. The Service requests the Board to dismiss the respondent's appeal and affirm his order of deportation to Korea.

We note that the Service has attached to its brief a Motion to Supplement the Record with a copy of a message dated April 1987 from the American Embassy in Seoul, indicating that the respondent's wife failed to mention her previous marriage and daughter when she received her immigrant visa. The message further states that upon investigation by the embassy it was discovered that the newspaper the respondent stated he was employed by before traveling to the United States had no record of his ever being employed there, and that the chemical company that the respondent stated that he owned had in fact employed the respondent as a laborer. Finally, the message indicates that it believes that the respondent and his wife lived together prior to leaving Korea and that the wife's daughter is the natural child of the respondent. Also attached are the federal income tax returns of the respondent's wife for 1983 and 1984.

On July 15, 1988, the respondent filed with the Board a Motion to Strike the Service Brief and to Deny the Service Motion to Supplement the Record, arguing that the Service brief was filed beyond the time allotted in the briefing schedule and that the Service had not requested an extension thereto. Further, the respondent argues that the Service made no motion to reopen the proceedings in order to present the "new" evidence which would have allowed the respondent to rebut the documents, nor were copies of these documents served on the respondent's counsel at the time of their receipt by the Service. As the Service's actions on appeal are unfair, argues the respondent, it should not be allowed to take unfair advantage of the appellate process.

First, the respondent has not pointed to any requirement that the Service had a duty to disclose the receipt of the documents attached to its brief prior to the time they were offered into the record for the Board's consideration. However, the respondent's point is well taken that the correct avenue for submitting new evidence subsequent to a deportation hearing is through a motion to reopen. *See* 8 C.F.R. §§ 3.2, 3.8, 103.5. The Board's usual practice is to disallow such evidence when it is attached to a brief, absent existent circumstances. We will make no exceptions in this case. Consequently, as the Service has made no effort to enlighten the Board as to why it could not have presented the documents at issue to the immigration judge during the respondent's deportation hearing, notwithstanding the fact that the Service did not receive the documents until subsequent to the hearing, we will not consider the documents belatedly produced by the Service in arriving at our decision in this case. The

Service has not indicated that it was unable to secure such documents prior to the hearing, or that such a request for the documents had been made in a timely manner in order to have them in its possession prior to the hearing. However, as to the belatedly filed Service brief, the Board will accept such brief as the respondent has not shown any prejudice based upon the Service filing a late brief. Consequently, we will consider the Service's brief submitted out of time, absent the documents attached thereto.

Turning first to the respondent's application for adjustment of status pursuant to section 245(a) of the Act, 8 U.S.C. § 1255(a), the burden of proof is upon the respondent to establish not only his eligibility for such relief but also that he is worthy of such relief as a matter of discretion. *Matter of Bufalino*, 11 I&N Dec. 351 (BIA 1955); *Matter of Blas*, 15 I&N Dec. 626, 629 (BIA 1976, A.G. 1976), *citing Thomaidis v. INS*, 431 F.2d 711 (9th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); 8 C.F.R. § 242.17(e).

Section 245 reads in pertinent part as follows:

> Section 245. (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment (2) the alien is eligible to receive an immigrant visa and if admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

We agreed with the Service that the respondent is not deserving of administrative discretion in this application. The respondent admitted that he paid $5,000 for a passport and visa with which he entered the United States and that such purchase was not through official channels, and that he quit his job and terminated his long-term lease on his house (Tr. at 7-8, 32-34, 36). We further note that in the July 29, 1986, decision of the district director denying the respondent's Application for Status as a Permanent Resident, Form I-291, the district director noted that at the respondent's interview by the Service on June 16, 1986, he swore under oath that he obtained his nonimmigrant visa from the American Embassy in Seoul and that his visa was valid, but that after the interview had ended the respondent admitted that he had in fact purchased his passport and visa, never applied for either document in a lawful manner, and fraudulently entered the United States through the use of such documents. Exhibit 5.

Based on the above, we find that not only did the respondent perpetrate a fraud upon entering the United States, but that he continued to perpetrate such fraud by attempting to obtain lawful permanent residence in the United States by lying under oath to an officer of the Immigration and Naturalization Service. We further find, upon a close reading of the record, the respondent's testimony unbelievable that he had no preconceived intent to permanently remain in the United States prior to traveling here. Such testimony is totally incredible when placed in the proper context of the circumstances surrounding his fraudulent entry where he admitted that he broke his long-term lease on his house, sold all of his

personal belongings to raise money for his departure, and quit his job.[2] Moreover, the respondent admitted that the man from whom he purchased his passport and visa told the respondent that he would "be taken care of" (Tr. at 33). We find that these negative factors of record clearly override the respondent's marriage, his desire to adopt his stepdaughter, and the other factors of record, fully justifying the immigration judge's discretionary denial of the respondent's application for adjustment of status.

Turning to the respondent's application for a waiver of his grounds of excludability pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i),[3] the respondent, citing to *Matter of Da Silva, supra,* and *Matter of Alonzo,* supra basically argues that it was error for the immigration judge to consider his fraudulent entry into the United States as an adverse discretionary factor where he is seeking to be forgiven for such fraud pursuant to section 212(i) of the Act. The Service, on the other hand, argues that it would be ludicrous to ignore the respondent's

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[2] In fact, the respondent seems to be conceding in his brief that he had formed an intent while in Korea of remaining permanently in the United States, Brief at 7, 12.

[3] Section 212(i): An alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks or has sought to procure, or has procured, a visa or other documentation, or entry into the United States, or other benefit under this Act by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, may be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States.

fraudulent conduct in this case where the only reason the fraud was perpetrated was to gain a benefit under the Immigration and Nationality Act.

First, cases decided by the Commissioner are not binding on the Board. *See Matter of Bennett*, Interim Decision 2995, at fn 2 (BIA 1984); 8 C.F.R. §§ 3.2(g), 103.3(e). In any event, we agree with the Service that it is entirely appropriate to consider the underlying conduct for which the 212(i) waiver is being sought, because, as the Service aptly points out, egregious conduct, such as engaged by the respondent in this case, would be treated no differently than minor misrepresentations, and where such conduct is appropriately considered as a discretionary factor in cases where aliens have engaged in fraudulent conduct to escape persecution. *See also Jen Hung Ng v. INS*, 804 F.2d 534 (9th Cir. 1986). *See Matter of Pula*, Interim Decision 3033 (BIA 1987). However, we do find as persuasive the Commissioner's opinion that Congress must have intended to apply a more liberal standard to an application for relief pursuant to section 212(i) than to an application for relief pursuant to section 212(h), which requires a showing of extreme hardship before a favorable discretionary grant will be made, even though both sections require the same relationship status.

However, we need not restrict our inquiry to only the respondent's fraudulent conduct in entering the United States, conduct for which a discretionary consideration of the respondent's application for a section 212(i) waiver would clearly apply. Pursuant to the Immigration Marriage Fraud Amendments of 1986 (Pub. L. 99-639, November 10, 1986), as amended by section 7(c) of the Immigration Technical Corrections Amendments of 1988

(Pub. L. 100-525, 102 Stat. 2616), the waiver provisions under section 212(i) were expanded to include all misconduct in relation to obtaining or attempting to obtain any "other benefit under this Act." Therefore, contrary to the Service's arguments, the respondent's fraudulent statements made in his interview for application for a change in status to that of a lawful permanent resident are also waivable pursuant to section 212(i)(1) of the Act as they were made to obtain a "benefit under the Act." Further, the respondent admitted making fraudulent statements during his interview when he was confronted after the interview with evidence clearly showing that he had lied under oath. Such an "admission" to the commission of perjury in connection with obtaining immigration benefits is also waivable conduct under section 212(i)(2).

In examining the negative aspects of this case, as noted above, the respondent obtained a passport and United States visa on the black market in Korea for $5,000.00; he formed the intent while in Korea to use these documents to gain entry into the United States so as to eventually gain lawful immigrant status; he was employed for a certain period of time in the United States without authorization; he gave false statements during a June 16, 1986, interview with the Service, and then again, in our opinion, attempted to mislead the immigration judge when he insisted during his deportation hearing that he did not form the intent while in Korea to remain permanently in the United States even though he admitted to the black market purchase of his passport and visa, and further admitted to quitting his job, breaking the long-term lease on his home, and selling his assets before leaving Korea. In essence, the respondent has engaged in

a continuous scheme of fraudulent conduct from prior to entering the United States up until the time of his deportation hearing, and that such fraudulent conduct would constitute deportability pursuant to section 241(a)(1) as excludable at entry under section 212(a)(19) of the Act, whether charged or not.

In examining the positive equities of record, we find that the respondent is married to a naturalized United States citizen whom he married shortly after his entry into the United States, and has sought to adopt his minor stepchild, who has recently applied for naturalization. We further note that the respondent's wife has a heart ailment, although we further note that such condition existed prior to the respondent meeting his wife; that his wife maintains full-time employment; and his wife is under the care of a psychiatrist, allegedly suffering from anxiety depression surrounding the respondent's uncertain status in the United States, and that it is the opinion of the psychiatrist that such anxiety exacerbates her heart ailment.

However, we do not believe that these positive equities of record overcome what we find to be the respondent's egregious conduct in committing fraud upon entry to the United States, and then lying under oath on two separate occasions in an attempt to perpetrate such fraud, which clearly indicates a lack of remorse for such conduct. While we recognize that the respondent's deportation from the United States may cause hardship on the respondent's wife and stepdaughter, we do not find any more hardship in this case than most families would endure due to the deportation of a family member. The respondent has spent most of his adult life in Korea and

will be able to return to his native country and pick up where he left off. The respondent's wife has indicated that she might be forced to go on welfare, although we are unsure why since at present she has a stable job and admitted that she will be able to use public transportation to go to and from work.

Furthermore, we have duly considered the letters from the two physicians in this case and agree with the Service that Dr. Hong's opinion does not state upon what factors he is basing his opinion, nor how long he has had a doctor-patient relationship with the respondent's wife. The timing of this letter, as the Service points out, appears suspect. Further, again as the Service points out, the respondent's wife's primary care physician, Dr. Park, does not state that the respondent's wife's anxiety depression has been induced by the respondent's uncertain immigration status, as the respondent alleges. As to the stepchild, although the respondent avers that she will be traumatized by his deportation, no evidence was submitted to show such a reaction, or that the child would suffer any more than any normal child in such circumstances. *See Jara-Navarrete v. INS*, 813 F.2d 1340 (9th Cir. 1987). Moreover, as we have found the respondent not credible in his testimony, we too question the respondent's bold assertion of trauma to this child, particularly without any attempt to corroborate such.

Accordingly, as a matter of discretion, we will not grant a section 212(i) waiver to this respondent due to the pattern of misconduct in which he engaged. For the same reason, we will uphold the immigration judge's denial of the respondent's application for voluntary departure. *See*

Matter of Rojas, 15 I&N Dec. 492 (BIA 1975). For the foregoing reasons, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ James P. Morris
FOR THE BOARD

APPENDIX C

8 U.S.C. § 1105a(a)

(a) The procedure prescribed by, and all the provisions of chapter 158 of title 28, United States Code, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proccedings [sic] under section 242(b) of this Act or comparable provisions of any prior Act, except that –

* * *

8 U.S.C. § 1182(a)(6)(C)(i) and (ii)

(a) *Classes of Excludable Aliens.* – Except as otherwise provided in this Act, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

* * *

(6) * * * (C) *Misrepresentation.* –

> (i) *In general.* – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this Act is excludable.
>
> (ii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

(as amended, reorganized and redesignated by § 601 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. Law 101-649, 104 Stat. 4978; formerly 8 U.S.C. § 1182(a)(19)).

8 U.S.C. § 1182(i)(1)

(i) The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) –

> (1) in the case of an alien who is the spouse, parent, or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence.
>
> * * *

(as amended by Sec. 601 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. Law 101-649, 104 Stat. 4978).